IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 06-13637

United States of America,
Plaintiff-Appellee,

v.

Hannibal Sonny Crumpler,
Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Alabama

Filed U.S. Court of Appeals, Eleventh Circuit
Apr. 13, 2007, Thomas K. Kahn, Clerk

Before HULL, MARCUS, Circuit Judges, and Barzilay,* Judge

Barzilay, Judge:

This case arises on appeal from Defendant-Appellant Hannibal Sonny Crumpler's ("Crumpler" or "Defendant-Appellant") conviction for conspiracy to commit fraud and for providing false statements to auditors, pursuant to 15 U.S.C. §§ 78j(b), 78ff, 78m(a) & (b)(2), 18 U.S.C. §§ 2, 371, and 17 C.F.R. §§ 240.10b-5, 240.13b2-1, 240.13b2-2(a), and the resulting forfeiture under 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c). Crumpler raises five principal arguments in his appeal. He

*Honorable Judith M. Barzilay, Judge, United States Court of International Trade, sitting by designation.

maintains (1) that the district court abused its discretion by determining that his notes did not qualify for admission under the business records exception to the hearsay rule; (2) that the court improperly imposed and enforced general guidelines for questioning witnesses; (3) that the court abused its discretion when it denied Crumpler's attempt to question a witness about whether the witness had previously claimed under oath to be the smartest man in the world; (4) that the application of the Civil Asset Forfeiture Reform Act ("CAFRA") to proceeds that Crumpler obtained before the law's effective date violated the *Ex Post Facto* Clause of the United States Constitution; and (5) that the jury's forfeiture verdict based upon Crumpler's stock options should have assessed the stocks' value at the time that he exercised his options, rather than when he sold the stock. For the reasons stated below, the Court affirms the district court on all grounds.

I. Jurisdiction and Standard of Review

This Court has jurisdiction over appeals from the judgment of criminal conviction from the District Court of Northern Alabama pursuant to 28 U.S.C. § 1291.

II. Exclusion of Evidence Under the Business Records Exception

"The district court has broad discretion in ascertaining admissibility of business record evidence, which should not be disturbed on review in absence of abuse." *United States v. Garnett*, 122 F.3d 1016, 1018 (11th Cir. 1997) (per curium); *accord United States v. Petrie*, 302 F.3d 1280, 1285 (11th Cir. 2002). In keeping with this deferential standard of review, this Court "review[s] factual findings regarding the admissibility of

business records . . . under a clearly erroneous standard." *Petrie*, 302 F.3d at 1285. If the Court finds an abuse of discretion, it still will not reverse the lower court's decision "unless the evidence had a substantial impact on the verdict," *i.e.*, was not harmless. *United States v. Campbell*, 73 F.3d 44, 47 (5th Cir. 1996) (per curium); *accord United States v. Fallen*, 256 F.3d 1082, 1091 (11th Cir. 2001). The Court, in turn, determines whether an error was harmless "by weighing the record as a whole, . . . examining 'the facts, the trial context of the error, and the prejudice created thereby as juxtaposed against the strength of the evidence of [the] defendant's guilt.'" *United States v. Hands*, 184 F.3d 1322, 1329 (11th Cir. 1999) (quoting *United States v. Reed*, 700 F.2d 638, 646 (11th Cir. 1983)). "Harmless error review . . . does not require [the court] to view witnesses' credibility in the light most favorable to the government." *Id.* at 1330 n.23.

Rule 803(6) of the Federal Rules of Evidence permits into evidence

> [a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Fed. R. Evid. 803(6). "It is not necessary for the person who actually prepared the documents to testify so long as there is other circumstantial evidence and testimony to suggest the trustworthiness of the documents." *Garnett*, 122 F.3d at 1019. Likewise, "it is not necessary that a sponsoring witness be employed by the business at the time of the making of each record. The witness must only be in a position to attest to its authenticity." *United States v. Evans*, 572 F.2d 455, 490 (5th Cir. 1978) (internal citation omitted).[1]

A. The District Court Properly Refused to Allow the Notes into Evidence

During the trial, Crumpler sought to enter into evidence six handwritten and typed notes that he wrote which concerned his actions relating to the fraud and conspiracy for which he was convicted. *See* Appellant's Ex. 18-A–F; R.E.[2] Tab E. According to Defendant-Appellant, "[t]he only specific evidence that tied [him] to the conspiracy was the testimony of Weston Smith and Bill Owens regarding the March 2002 confirmation letters," without which "the Government would not have proven Defendant Crumpler's guilt beyond a reasonable doubt." Appellant's Br. 23. Appellant claims that these documents would have undermined Smith and Owens' testimony

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[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions handed down by the former Fifth Circuit before the close of business on September 30, 1981.

[2] "R.E." stands for Record Excerpts.

because they "established [Crumpler's] good faith and lack of criminal intent with respect to the confirmation letters by showing that he did not act in concert with the conspirators at HealthSouth." Appellant's Br. 24.

During the evidentiary hearing, Michael A. Plaia, once Senior Vice President of Planning and Development for Source Medical, later Senior Vice President Chief Operating Officer, and a custodian of HealthSouth's records, testified that he recognized the documents in question, verified that Crumpler created them at the time of the audit confirmation process at HealthSouth, and attested to the fact that Crumpler had knowledge of the events detailed within the documents. He also confirmed that Crumpler created the documents as a part of his regular business practice, one shared by most of HealthSouth's management. *See* Appellant's R.E. Tab D 17–28. Likewise, Larry D. Carr, an accountant with no formal ties to HealthSouth, testified that he recognized the documents, helped Crumpler draft some of them, and believed the contents of the documents to accurately reflect what he knew of the events discussed within them, though this knowledge apparently came from Crumpler himself. *See* Appellant's R.E. Tab D 33, 35–36, 47–49.

The district court ruled the documents inadmissible on several grounds. First, it found Larry Carr unqualified to attest to their authenticity since he did not work for HealthSouth. *See* Appellant's R.E. Tab D 58. It also held Mr. Plaia's testimony inadequate because he "did not testify that it was [Crumpler's] and Source Medical Solutions Incorporated's practice to maintain these notes in the files as a part of the regular course of [its] business" and "[could] not testify that the notes are accurate." Appellant's R.E. Tab D 59–60. The court also declared that "the source of information in the notes is the defendant, who is accused of fraud in the very dealings his writings seek to explain. Thus, the source of the

information indicates lack of trustworthiness." Appellant's R.E. Tab D 59–60. Finally, the court reasoned that the testimony of Carr and Plaia did not sufficiently demonstrate that Crumpler had not prepared the documents in anticipation of criminal or civil litigation. *See* Appellant's R.E. Tab D 61.

Though the district court erred in portions of its analysis, its decision to exclude the documents from evidence was not an abuse of discretion. First, contrary to the court's assertion, the hearing transcript clearly demonstrates that Mr. Plaia testified that creating and maintaining the documents in question was a business practice of HealthSouth management and Crumpler himself. *See* Appellant's R.E. Tab D 22–23. Moreover, that Plaia could not testify to the accuracy of the information contained within the notes is immaterial. *See Rosenberg v. Collins*, 624 F.2d 659, 665 (5th Cir. 1980) ("Any person in a position to attest to the authenticity of certain records is competent to lay the foundation for the admissibility of the records; he need not have been the preparer of the record, nor must he personally attest to the accuracy of the information contained in the records."). However, while it is generally understood that "[t]he bare fact that the man who supervised the making of the records relies on them is no bar to their admission into evidence" as business records, the circumstances of this case arguably warranted departure from this stance. *Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 88 (3d Cir. 1960). Neither Plaia nor Carr could

> testify about the initial link in the chain producing the record[s] – that is, whether the circumstances surrounding the origination and compilation of the documents indicate reliability and trustworthiness. In this case, such testimony is particularly necessary because this case revolves around

> allegations of fraudulent transactions involving financial documents drafted by the very parties who created the documents the defendant now seeks to introduce . . . .

Petrie, 302 F.3d at 1288 (quotations & citations omitted); *see also United States v. N.Y. Foreign Trade Zone Operators, Inc.*, 304 F.2d 792, 797 (2d Cir. 1962) (citing *Palmer v. Hoffman*, 318 U.S. 109, 113, 114, 63 S. Ct. 477, 480, 481 (1943)). The lower court was not clearly erroneous in finding that Crumpler did not satisfy the trustworthiness element of the business records exception and, therefore, could not submit the notes into evidence.

Furthermore, even if the district court erred, the exclusion of the documents would have constituted harmless error. An examination of the record demonstrates that most of the content in the documents that Crumpler deemed crucial to his defense entered the record through the confirmation letters, his responses to those letters, and the testimony of Daryl Brown. *See, e.g.*, Trial Tr. ("Tr.") vol. 15, 66–73, 82, Nov. 15, 2005; Tr. vol. 16, 5–9, 15, 44–45, 47–48, Nov. 16, 2005. Their exclusion therefore minimally prejudiced Defendant-Appellant's case, if at all. In addition, the testimony of Emery Harris, Bill Owens, Weston Smith, and Kenneth Livesay proved so incriminating that admission of the notes into evidence would not have had a discernable impact on the trial's outcome. *See, e.g.*, Trial Tr. vol. 11, 86, 88, 149, 168, Nov. 8, 2005; Tr. vol. 14, 16–17, Nov. 14, 2005; Tr. vol. 12, 60–65, Nov. 9, 2005; *see also* Tr. vol. 11, 153–55. The district court's decision not to allow Crumpler's notes into evidence is affirmed.

III. The Questioning of Witnesses at Trial

Defendant-Appellant also objects to the district court's imposition and enforcement of general restrictions

on the questioning of witnesses. More specifically, according to Crumpler, the district court violated the Confrontation Clause when it refused to allow him to ask Bill Owens, one of the government's key witnesses, whether in prior judicial proceedings he asserted that he believed himself to be the smartest man in the world.

The Sixth Amendment guarantees a criminal defendant the right "'to be confronted with the witnesses against him'" – a right which includes "the right to conduct reasonable cross-examination." *Olden v. Kentucky*, 488 U.S. 227, 231, 109 S. Ct. 480, 482–83 (1988) (per curium) (quoting U.S. Const. amend. VI.); *accord United States v. Arias-Izquierdo*, 449 F.3d 1168, 1178 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 521 (2006); 127 S. Ct. 996 (2007); 127 S. Ct. 1001 (2007); 127 S. Ct. 1041 (2007). In practice, this guarantee means that "the cross-examiner has traditionally been allowed to impeach . . . the witness," since "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Olden*, 488 U.S. at 231, 109 S. Ct. at 483 (quotations & citation omitted); *see Arias-Izquierdo*, 449 F.3d at 1178 ("[T]he Confrontation Clause requires a defendant to have some opportunity to show bias on the part of a prosecution witness."). Accordingly, "[a] defendant's confrontation rights are satisfied when the cross-examination permitted exposes the jury to facts sufficient to evaluate the credibility of the witness and enables defense counsel to establish a record from which he properly can argue why the witness is less than reliable." *Arias-Izquierdo*, 449 F.3d at 1178 (quotations & citation omitted). Nevertheless, "[t]rial judges retain wide latitude to impose reasonable limits on cross-examination based on concerns about, among other things, confusion of the issues or interrogation that is repetitive or only marginally relevant." *Id.* (quotations & citation omitted) (brackets in original); *accord Olden*, 488

U.S. at 231, 109 S. Ct. at 483.

If the trial court violated the defendant's right to impeach a witness, this Court must determine

> "whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was *harmless beyond a reasonable doubt*. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to the reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case."

Olden, 488 U.S. at 232–33, 109 S. Ct. at 483–84 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 1438 (1986)) (emphasis added); *see United States v. Mills*, 138 F.3d 928, 938 (11th Cir. 1998) ("[T]he 'harmless beyond a reasonable doubt standard' already respects the constitutional origin of the right and elevates it over mere statutory or evidence-rule rights."); *Wasko v. Singletary*, 966 F.2d 1377, 1383 (11th Cir. 1992).

A. The General Guidelines for Questioning Witnesses

Near the commencement of the trial, the district court distributed to parties' counsel a handout with instructions on how to question witnesses throughout the trial. It read:

1. Except when the last sentence of Rule

> 611(c) is clearly applicable, do not lead on direct. Ask questions in a fashion which does not suggest the answer.
> 2. On cross-examination, leading questions should be succinct and not loaded or long, rambling statements. The evidence should not be recounted. The question should be a question within itself. Do not make a long, rambling, compound statement and then say
> "Did you?"
> "Isn't that true?"
> "Have you?"
> "Do you agree?"
> "Correct?" etc.
> Do not argue. Again, with emphasis:
> 1. Do not lead on direct.
> 2. On cross, do not lead, ramble, or make long, rambling compound statements followed by:
> "Isn't it true," "correct," "do you agree," etc. or other second questions.
> Ask succinct, one sentence questions, even when leading. To do the contrary[] leads to excessive delays. Repeated violations will result in sanctions. Interim violations may result in open court corrections.
> Do not make argumentative asides or engage in repartee with opposing counsel.

Appellee's Br. 34; *see* Appellant's Br. 40 n.14. The district court issued these instructions to facilitate the flow of the trial and to avoid unnecessary delays or confusion, and they appear well-tailored to achieve this purpose. None of the listed interrogatory prohibitions inhibited Crumpler from effectively cross-examining the government's witnesses. *See, e.g.*, Tr. vol. 11, 7–8, 10–11, 14–18; Tr. vol. 12, 21–22, 27–28, 34, 43, 55–57, 70–72; Tr. vol. 13, 123–25, 134–

35, 138–40, Nov. 10, 2005. The instructions consequently do not fall afoul of the Sixth Amendment.

B. The Smartest Man in the World

Similarly, no Sixth Amendment violation occurred when the district court refused to allow Crumpler to ask Bill Owens whether he previously stated that he was the "smartest man on earth." Crumpler insists that only this line of questioning could have lead the jury to doubt the veracity of Owens' testimony, specifically (1) Owens' frequent inability to recall facts about which he previously testified, (2) his last-minute recollection of an incriminating conversation with Crumpler that he claims he had despite never mentioning it in any previous interview or investigation, and (3) his supposed inability to understand how to discuss fraudulent activities with Crumpler while wearing a body recorder.

The court correctly held that the proposed line of questioning lacked relevance and, even if it were relevant, was unduly prejudicial to the government. As Crumpler himself concedes, he managed to have Owens testify that he would be sentenced for his convictions three weeks after he appeared in Crumpler's trial. *See* Appellant's Br. 42–43. Though Owens claimed that this timing had no effect on his behavior, the jury easily could have concluded that Owens had motivation to give false testimony against Crumpler in return for a possibly lighter sentence. *See United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992) ("The importance of . . . cross-examination does not depend upon whether or not some deal in fact exists between the witness and the government. What counts is whether the witness may be shading his testimony in an effort to please the prosecution.") (citation omitted). Furthermore, a jury would not have missed the striking contrast between Owens' repeated forgetfulness and his wondrous

recollection of a neverbefore-mentioned incriminating conversation. Crumpler could have – and indeed appears to have – exposed Owens' duplicitous motivations for providing testimony without depending on the fact that Owens once fancied himself the "smartest man in the world" be revealed in open court. *See, e.g.*, Tr. vol. 13, 123–25, 134–35, 138–40. *Compare* Tr. vol. 13, 123 ("A [Owens:] I don't know what a perjury conviction is."), *with* 134 ("Q [Counsel:] But you drew the line at perjury? A [Owens:] I did.") *and* 135 ("A [Owens:] I came to the conclusion that to keep the house of cards together, I would have to commit perjury. And that was a line that I was not willing to cross."). *See United States v. King*, 713 F.2d 627, 630 (11th Cir. 1983) (holding that limitation on scope and breadth of cross-examination did not significantly curtail effectiveness of witness' cross-examination because cross-examination was lengthy and extensive). Not only was Crumpler's proposed line of questioning irrelevant to his defense, *see Petrie*, 302 F.3d at 1287; *Wasko*, 966 F.2d at 1381 ("[T]he sixth amendment only protects cross-examination that is *relevant* . . . ."), but exposing Owens' hubris probably would have compelled the jury to disregard Owens' testimony not because of its internal inconsistencies, but because of Owens' unflattering personality. *See King*, 713 F.2d at 631 (noting that Fed. R. Evid. 403 "permits the trial court to exclude evidence otherwise admissible because the 'probative value' of that evidence 'is substantially outweighed by the danger of unfair prejudice.' . . . . The major function of Rule 403 is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.") (quotations omitted). *See generally Hands*, 184 F.3d at 1326–29. The district court did not err by prohibiting Crumpler from asking Owens whether he styled himself the "smartest man on earth."

IV. The Use & Application of the Civil Asset Forfeiture Reform Act

Crumpler asserts that the application of CAFRA to the conspiracy proceeds that he obtained before the effective date of the Act violated the *Ex Post Facto* Clause. Even if the Court finds no violation, he contests the jury's verdict of forfeiture based upon his stock options, which set their fair market value at the stock price when he exercised his options rather than when he sold the stock.

The application of a forfeiture statute, in this case 18 U.S.C. § 981(a)(1)(C), and whether it violates the *Ex Post Facto* Clause is a question of law, and the court therefore reviews the findings of the district court *de novo*. *See United States v. Hersh*, 297 F.3d 1233, 1244 (11th Cir. 2002). The *Ex Post Facto* Clause "prohibits the enactment of statutes that punish as a crime an act previously committed which was innocent when done." *Id.* "[W]hen a defendant is charged with a conspiracy that continues after the effective date of the statute," however, no violation occurs. *Id.*

The jury in the trial court convicted Crumpler of such a "straddling" conspiracy. Although the conspiracy began prior to the August 23, 2000, date upon which CAFRA became effective, it continued beyond that date through March 2002, rendering all proceeds that Crumpler acquired due to the conspiracy – specifically the stock options that he exercised in 1997 and the bonuses that he received from 1996 through May 2000 – subject to the forfeiture statute. The district court's application of CAFRA to these proceeds thus did not violate the *Ex Post Facto* Clause.

Crumpler further argues that the court improperly valued the proceeds of the stock he fraudulently acquired by treating the date that he exercised his stock options as dispositive. He avers that the district court should have

valued the stock at the time he sold it because prior to that event, the stock's value merely constituted unrealized gains. *See* Appellant's Br. 49. Crumpler's argument, however, has no basis in statutory or case law; rather, it appears to derive from capital gains taxation accounting practices. As demonstrated by the statute itself, "[*a*]*ny* property, real or personal, which constitutes or is derived from proceeds traceable to . . . a conspiracy to commit such an offense" is subject to forfeiture. 18 U.S.C. § 981(a)(1)(C) (emphasis added). Congress did not limit the statute's reach to liquid assets or cash. Accordingly, Crumpler need not have sold his stock to render the proceeds subject to forfeiture. *See* 28 U.S.C. § 2461(c) (ordering forfeiture under CAFRA to be exercised as described under 18 U.S.C. § 3554); 18 § 3554 (ordering forfeiture under section to occur in accordance with 18 U.S.C. § 1963); 18 U.S.C. § 1963 (RICO forfeiture statute); *United States v. Conner*, 752 F.2d 566, 575 (11th Cir. 1985) (stating that "[*e*]*very* property interest, including a *right* to profits or proceeds[,] may be described as an interest in something" when applying RICO forfeiture statute) (emphasis added), 576 ("Since the forfeiture is *in personam*, it follows the defendant as a part of the penalty and thus it does not require that the government trace it . . . . It matters not that the government received the identical money which the defendants received as long as the *amount* that was received . . . is known."); *United States v. Simmons*, 154 F.3d 765, 770 (8th Cir. 1998) (noting that under 18 U.S.C. § 1963, "[d]efendants . . . must forfeit any property constituting, or derived from, any proceeds which the person obtained") (defining "proceeds" under RICO forfeiture statute as meaning "gross receipts of the illegal activity"). Moreover, it would be absurd to permit a criminal to mitigate the value of property that he must forfeit by squandering or poorly investing the illegally acquired proceeds, which Crumpler's argument essentially

proposes. The district court applied the forfeiture statute appropriately, and its holding is affirmed.

V. Conclusion

After review and oral argument, and for the reasons outlined above, we affirm the actions of the district court on all matters contested by Defendant-Appellant.

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

United States of America, Plaintiff-Appellee,	:	
	:	Case No:
v.	:	2:04CR502-VEH
	:	
Hannibal Sonny Crumpler, Defendant-Appellant.	:	

Filed Nov. 30, 2005, U.S. District Court
N.D. Alabama

MEMORANDUM OPINION AND ORDER

This matter comes before the court on Defendant Crumpler's motion to strike and dismiss all forfeiture allegations prior to the August 23, 2000, implementation date of the Civil Asset Forfeiture Reform Act (CAFRA)(doc. 57). Oral arguments on this motion to strike were heard by the court on November 28, 2005.

I. Procedural History

The Superseding Indictment charges Crumpler with: (1) Conspiracy under 18 U.S.C. § 371; (2) False Statements to Auditors under 15 U.S.C. §§ 78m(a), 78m(b)(2), 78ff, 18 U.S.C. § 2, and 17 C.F.R. 240.13b2-2(a); and (3) includes a criminal forfeiture count under 18 U.S.C. § 981(a)(1)(c) and 28 U.S.C. 2461(c). A jury found Crumpler guilty of Counts One and Two of the Superseding Indictment. The Government's forfeiture allegations are based on Count One of the Superseding Indictment.

Crumpler asserts that all forfeiture allegations referencing acts that occurred before the effective date of CAFRA are due to be stricken because, prior to the enactment of CAFRA, there was no criminal asset forfeiture statute for the crimes of which he has now been found guilty. As such, Crumpler argues that the *ex post facto* clause of the United States Constitution (Art. I, § 9 cl. 3) is violated as to all proposed forfeiture claims prior to August 23, 2000, despite the fact that, by finding Crumpler guilty of Count Two, the jury necessarily found that the (Count One) conspiracy in which Crumpler participated began prior to the effective date of CAFRA, continued until after CAFRA was enacted into law, and that Crumpler committed an overt act in furtherance of the conspiracy on or about March 10, 2002 (after the effective date of CAFRA).

II. Analysis

A. Forfeiture

The procedures governing criminal forfeiture are set forth in Federal Rule of Criminal Procedure 32.2(b)(1), which provides:

> As soon as practicable after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the

> amount of money that the defendant will be ordered to pay. The court's determination may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.

Under 18 U.S.C. § 981(a)(1)(C), "any property that constitutes or is derived from proceeds traceable to a violation of a specified unlawful activity, as defined in 18 U.S.C. § 1956(e)(7), or a conspiracy to commit such offense, is subject to criminal forfeiture." *Id.* In the present case, Crumpler violated a "specified unlawful activity" under § 981(a)(1)(C) due to his conviction for securities fraud under 15 U.S.C. §§ 78m(a), 78m(b)(2), 78ff.

Title 28 U.S.C. § 2461(c) authorizes criminal forfeiture for any offense for which Congress has authorized civil forfeiture. The statute states:

> If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with the procedures set forth in section 413 of the Controlled Substances Act, 21 U.S.C. § 853, other than subsection (d) of that section.[1]

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[1]The sole subsection of 21 U.S.C. § 853 requiring a preponderance of the evidence burden is § 853(d), which states that,

"The Supreme Court has said that forfeiture is not a separate offense, but is instead 'an aspect of punishment imposed following conviction of a substantive criminal offense.'" *U.S. v. Cabeza*, 258 F.3d 1256, 1257 (11th Cir. 2001) (quoting *Libretti v. United States*, 516 U.S. 29, 116 S.Ct. 356, 363, 133 L.Ed.2d 271 (1995)). Criminal forfeiture is a sentencing matter and a preponderance of the evidence standard governs such matters. *U.S. v. Dicter*, 198 F.3d 1284, 1289 (11th Cir. 1999). Under CAFRA, "once the defendant is convicted of an offense on proof beyond a reasonable doubt, the government is only required to establish the forfeitability of the property subject to criminal forfeiture as a result of that offense by a preponderance of the evidence". *U.S. v. Schlesinger*, 2005 WL 2737051, *2 (E.D.N.Y. 2005)(relying upon *Libretti v. United States*, 516 U.S. 29 (1995)); *U.S. v. Fruchter*, 411 F.3d 377 (2nd Cir. 2005)).[2]

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that-

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

[2]In a pre-CAFRA ruling, the 11th Circuit examined a criminal forfeiture claim under the policy behind and language of 21 U.S.C. § 853(a), without reference to or analysis regarding § 853(d), and held that the burden of proof for a criminal forfeiture count is by a preponderance of the evidence. See *U.S. v. Dicter*, 198 F.3d 1284 (11th Cir. 1999). Following the ruling in *Dicter*, the 11th Circuit again addressed the burden of proof for a criminal forfeiture claim, expressly rejected the proposition that the Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to criminal forfeiture proceedings, and held that the decision and reasoning in *Dicter* remains good law. *U.S. v. Cabeza*, 258 F.3d 1256, 1257 (11th Cir. 2001). However, the 11th Circuit has not yet specifically addressed whether or not a preponderance of the evidence standard would apply in a criminal

B. The *ex post facto* clause is not violated due to the facts that conspiracy is a continuous crime and the conspiracy in the case at hand continued after the effective date of CAFRA.

There are two critical elements that must be present for a criminal or penal law to be *ex post facto*: (1) it must apply to events occurring before its enactment; and (2) it must disadvantage the offender affected by it. *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 964 (1981). Because the first element of the *Weaver* test is not satisfied, the court will not consider the merits of the second element.

Under the first element of this test, the court must discern whether a conspiracy that began before the effective date of CAFRA qualifies as an event "occurring before its enactment." *Id.* "Since the conspiracy is a continuous crime, a statute increasing the penalty for a conspiracy beginning before the date of enactment but continuing afterwards does not violate the *ex post facto* clause." *United States v. Hersh*, 297 F.3d 1233, 1244 (11th Cir. 2002)(quoting *United States v. Terzado-Madruga*, 897 F.2d 1099, 1124 (11th Cir. 1990)). The court is additionally persuaded by the holding of *U.S. v. Schlesinger, supra*, in which the Defendants contended that the application of CAFRA to their mail and wire fraud convictions violated the *ex post facto* clause. The facts of *Schlesinger* are substantially similar to the case presently before this court in that the Defendants in *Schlesinger* and Crumpler each were charged with a conspiracy that began before but continued beyond CAFRA's effective date. In *Schlesinger*, the court held that because "[t]he indictment

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forfeiture case under 28 U.S.C. § 2461(c). In another ruling in this case, this court held that a preponderance of the evidence standard does apply in such a case.

upon which the defendants were convicted lists a conspiracy that continued beyond August 23, 2000 ... it appears that the crime occurred after the effective date of the statute [CAFRA] and the *ex post facto* clause of the Constitution has no consequence with regard to this claim." *U.S. v. Schlesinger*, 2005 WL 2737051, *11. In keeping with this holding, and the holdings in *Hersh* and *Terzado-Madruga*, the *ex post facto* clause is not violated, under the first prong of a *Weaver* analysis, when the government seeks criminal forfeiture of assets based on a conspiracy that began before and continued after the effective date of CAFRA.

Crumpler argues that the overt act necessary to trigger CAFRA is the receipt of the proceeds from the conspiracy rather than an overt act in furtherance of the conspiracy itself. The court disagrees. In order for the conspiracy to continue after the effective date of CAFRA, the government bears the burden of proving that an overt act in furtherance of the conspiracy occurred after August 23, 2000. See *U.S. v. Hersh*, 297 F.3d 1233, 1244 -1245 (11th Cir. 2002). The jury's verdicts as to Counts One and Two establish that, not only did an overt act in furtherance of the conspiracy occur after August 23, 2000, but that Crumpler personally committed such an overt act on or about March 10, 2002.

III. Conclusion

For the reasons articulated herein, Crumpler's motion to strike (doc. 57) is **DENIED**.

DONE and **ORDERED** this 28th day of November, 2005.

VIRGINIA EMERSON HOPKINS
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-13637

United States of America, :
Plaintiff-Appellee, :
:
v. :
:
Hannibal Sonny Crumpler, :
Defendant-Appellant. :

On Appeal from the United States District Court
For the Northern District of Alabama

Filed, U.S. Court of Appeals, Eleventh Circuit
June 8, 2007, Thomas K. Kahn, Clerk

Before HULL, MARCUS, Circuit Judges, and Barzilay,* Judge.

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT: June 8, 2007

*Honorable Judith M. Barzilay, Judge, United States Court of International Trade, sitting by designation.